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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-510

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner,

v.

THE UNTED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS LEASEWAY TRANSPORTATION CORPORATION, CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., CRETE CARRIER CORPORATION AND WHIRLPOOL CORPORATION

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STATEMENT OF THE CASE

The Interstate Commerce Commission is an independent regulatory body charged by Congress with carrying out the provisions of the Interstate Commerce Act. *See* 49 U.S.C. §§10301, 10321. One of those provisions generally proscribes dual operations by motor carriers, *i.e.* the holding of both a certificate of a motor common carrier and a permit of a motor contract carrier to transport property over the same route or in the same area, but permits dual oper-

ations when the Commission finds good cause consistent with the public interest and the national transportation policy. 49 U.S.C. §10930. Congress has amended or revised this provision several times since its enactment in 1935, *see* Pub. L. No. 74-255, 49 Stat. 554 (1935); Pub. L. No. 76-785, 54 Stat. 919, 923 (1940); Pub. L. No. 95-473, 92 Stat. 1415 (1978), and the Commission has adjusted its interpretation of the statute over the years to conform to these changes as well as to the evolution of the motor carrier industry. *See, e.g., Luper Transp. Co. Contract Carrier Application,* 9 M.C.C. 451 (1938); *Block Common Carrier Application,* 49 M.C.C. 651, 655 (1940); *Delaware Express Co. v. Milford Express, Inc.,* 119 M.C.C. 499 (1973); *Delaware Express Co. v. Milford Express, Inc.,* 126 M.C.C. 462 (1977). The rule challenged by petitioners and upheld by the court below is a further development in the Commission's interpretation and enforcement of this statute.

The rule, which revised 49 C.F.R. by adding a new subpart 1004.3, was promulgated by the Commission on April 6, 1978, pursuant to its authority under 49 U.S.C. §§10321 and 10930, and 5 U.S.C. §§553 and 559, after serving notice of the proposed rule in the Federal Register (42 Fed. Reg. 54843, October 11, 1977) and inviting interested parties to submit comments. The new rule provides that in applications in which a motor carrier seeks dual operations authority the Commission will no longer give *individual* consideration to whether such authority is consistent with the public interest and the national transportation policy, unless there is a showing in a particular case that rate or service preference is likely to be extended or other discrimination is likely to be practiced. Appendix D, at 40a of Petition for Certiorari.

The Court of Appeals for the District of Columbia Circuit rejected petitioners' challenge to the rule. The court

found first that the rule was not inconsistent with congressional intent. Although Congress expressed certain concerns with regard to motor carriers operating as both contract and common carriers, it "delegated to the Commission the task of ensuring" that potential abuses do not arise, and invested the Commission "with broad discretion in the discharge of its delegated responsibilities." Appendix A, at 12a of Petition for Certiorari. The court also found that the Commission's use of its rulemaking authority was proper. *Id.* at 13a-15a. Second, the court found that the rule has a rational basis since, among other reasons, rate discrimination by dual operators is virtually nonexistent, and other sections of the Interstate Commerce Act provide a more effective method by which the Commission may prevent dual operations abuse. *Id.* at 15a. Finally, the court held that the rule did not deny petitioners procedural due process in future Commission hearings by improperly shifting the burden of proof. *Id.* at 16a.

REASONS FOR DENYING THE PETITION

The Petition Must be Denied Because It is Untimely

The judgment of the Court of Appeals for the District of Columbia Circuit affirming the order of the Interstate Commerce Commission was filed on June 26, 1979. Appendix B, at 18a of Petition for Certiorari. 28 U.S.C. §2101(c) provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree." Consequently, the petition for certiorari in the present action was required by statute to have been filed on or before September 24, 1979. However, it was not filed until September 26, 1979, and therefore must be denied because it is out of time.

Recognizing that the petition was filed out of time, petitioners have now filed a "motion to accept late filed petition for writ of certiorari." [1] This motion should not be considered. First, the motion was filed after the deadline for filing the petition had expired. Rule 34(2) of the Rules of this Court provides that an application seeking an extension of time in which to file a petition for certiorari "must be presented to the clerk within the period sought to be extended." [2] Consequently, the motion was not properly filed under the Rules of the Court.

Second, and of equal importance, is the policy that these respondents perceive to underlie Rule 34(2). The 90-day period for filing a petition for certiorari is a lengthy one. While that may be appropriate for the difficulty of deciding whether to seek review in this Court and of drafting an adequate petition for certiorari, the prevailing party and the court of appeals are entitled to know by the end of it what are the intentions of the losing party with respect to possible further review by this Court. The procedure now dictated by Rule 34(2) serves that purpose. Under the Rule a losing party *must*, by the end of the 90-day period, either have filed his petition or sought leave for an extension of time to do so.

[1] Counsel for these respondents were not served with this motion as required by Rule 34(3) of the Rules of this Court, and obtained a copy of the motion from the petitioners only after learning by chance from counsel for the Commission that the motion had been filed.

[2] Rule 34(2) also provides that a motion for extension of time in which to file a petition for certiorari shall be submitted at least ten days before the expiration of the period sought to be extended, and will not be granted except in the most extraordinary circumstances if filed during the last ten days of the period. Not only did petitioners not file their motion for extension of time within ten days before the date on which the petition was due, but they offered "no other excuse for the late filing" than a "miscalculation in determining the length of the 90-day period." Motion, at 2. This excuse would not have been adequate even if the motion had been filed on time, and cannot justify the late filing of the petition.

This imposes judicial finality on cases litigated in the courts of appeals and affords certainty and repose to the parties. If these petitioners' motion were granted — indeed, if this Court ever were to grant a motion for extension filed after the 90-day period had ended — then a party that had prevailed in the court of appeals would be required to wait the additional 60 days permitted by 28 U.S.C. §2101, or a total of 150 days, rather than merely 90 days, before knowing to a certainty whether this Court would entertain an attempt by the losing party to seek review of the decision of the court of appeals. This would be a most serious infringement on prevailing parties' rights of repose, and is certainly not warranted by the facts surrounding petitioners' failure to file a timely petition for certiorari. Consequently, the motion to accept the late filed petition must be denied.

CONCLUSION

For the foregoing reasons, respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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